A

PROTEST.

DIE MARTIS 29° NOVEMBRIS, 1763.

LONDON:

PRINTED IN THE YEAR M.DCC.LXIV.

A

PROTEST.

Die Martis 29 Novembris 1763.

THE ORDER of the Day for reſuming the adjourned Conſideration of the Report of the Conference with the Commons on *Friday* laſt being read,——

The third Reſolution of the Commons was read as follows:

RESOLVED by the Commons in Parliament aſſembled,

THAT Privilege of Parliament does not extend to the Caſe of writing and publiſhing ſeditious Libels, nor ought to be allowed to obſtruct the ordinary Courſe of the Laws, in the ſpeedy and effectual Proſecution of ſo heinous and dangerous an Offence.

AND it being moved to agree with the Commons in the ſaid Reſolution.

THE ſame was objected to, after long Debate thereupon.

THE Queſtion was put, Whether to agree with the Commons in the ſaid Reſolution.

IT was reſolved in the Affirmative.

DISSENTIENT,

BECAUSE we cannot hear, without the utmoſt Concern and Aſtoniſhment, a Doctrine advanced now, for the firſt Time, in this Houſe, which we apprehend to be new, dangerous and unwarrantable, *viz.*—— THAT the perſonal Privilege of both Houſes of Parliament has never held, and ought not to hold, in the Caſe of any criminal Proſecution whatſoever; by which all the Records of Parliament, all Hiſtory, all the Authorities of the graveſt and ſobereſt Judges, are entirely reſcinded; and the fundamental Principles of the Conſtitution, with Regard to the Independance of Parliament, torn up and buried under the Ruins of our moſt eſtabliſhed Rights.

WE are at a Loſs to conceive, with what View ſuch a Sacrifice ſhould be propoſed, unleſs to amplify, in Effect, the Juriſdiction of the inferior, by annihilating the ancient Immunities of this ſuperior Court.

THE very Queſtion itſelf, propoſed to us from the Commons, and now agreed to by the Lords, from the Letter and Spirit of it, contradicts this Aſſertion; for, whilſt it only narrows Privilege in criminal Matters, it eſtabliſhes the Principle. The Law of Privilege, touching Impriſonment of the Perſons of Lords of Parliament, as ſtated by the two ſtanding Orders, declares generally, That no Lord of Parliament, ſitting the Parliament, or within the uſual Times of Privilege of Parliament, is to be impriſoned or reſtrained, without Sentence or Order of the Houſe, unleſs it be for Treaſon or Felony, or for refuſing to give Security for the Peace, and Refuſal to pay obedience to a Writ of HABEAS CORPUS.

THE firſt of theſe Orders was made after long Conſideration, upon a Diſpute with the King, when the Precedents of both Houſes had been fully inſpected, commented upon, reported and entered in the Journals, and after the King's Council had been heard. It was made in ſober Times, and by a Houſe of Peers,

not

not only loyal, but devoted to the Crown, and it was made by the unanimous Conſent of all, not one diſſenting. Theſe Circumſtances of Solemnity, Deliberation and Unanimity, are ſo ſingular and extraordinary, that the like are ſcarce to be found in any Inſtance among the Records of Parliament.

WHEN the two Caſes of Surety for the Peace, and HABEAS CORPUS come to be well conſidered, it will be found, that they both breathe the ſame Spirit, and grow out of the ſame Principle.

THE Offences that call for Surety and HABEAS CORPUS, are both Caſes of preſent continuing Violence. The Proceedings in both have the ſame End, *viz.* To repreſs the Force, and to diſarm the Offender.

THE Proceeding ſtops in both, when that End is attained; the Offence is not proſecuted, nor puniſhed in either; the Neceſſity is equal in both, and if Privilege was allowed in either, ſo long as the Neceſſity laſts, a Lord of Parliament would enjoy a mightier Prerogative than the Crown itſelf is entitled to. Laſtly, they both leave the Proſecution of all Miſdemeanors ſtill under Privilege, and do not derogate from that great Fundamental, that none ſhall be arreſted in the Courſe of Proſecution for any Crime under Treaſon and Felony.

THESE two Orders comprize the whole Law of Privilege, and are both of them ſtanding Orders, and conſequently the fixed Laws of the Houſe, by which we are all bound, until they are duly repealed.

THE Reſolution of the other Houſe now agreed to, is a direct Contradiction to the Rule of parliamentary Privilege, laid down in the aforeſaid ſtanding Orders, both in Letter and Spirit. Before the Reaſons are ſtated, it will be proper to premiſe two Obſervations:

Firſt,

Firſt, THAT in all Caſes where Security of the Peace may be required, the Lord cannot be committed till that Security is refuſed; and conſequently the Magiſtrate will be guilty of a Breach of Privilege, if he commits the Offender, without demanding that Security.

Secondly, Although the Security ſhould be refuſed, yet, if the Party is committed generally, the Magiſtrate is guilty of a Breach of Privilege, becauſe the Party refuſing, ought only to be committed till he has found Sureties: Whereas, by a general Commitment, he is held faſt, even though he ſhould give Sureties, and can only be diſcharged by giving Bail for his Appearance.

THIS being premiſed, the firſt Objection is, to the Generality of this Reſolution, which, as it is penned, denies the Privilege to the ſuppoſed Libeller, not only where he refuſes to give Sureties, but likewiſe throughout the whole Proſecution, from the Beginning to the End; ſo that although he ſhould ſubmit to be bound, he may notwithſtanding, be afterwards arreſted, tried, convicted, and puniſhed, ſitting the Parliament, and without Leave of the Houſe, wherein the Law of Privilege is fundamentally miſunderſtood, by which no Commitment whatſoever is tolerated, but that only, which is made upon the Refuſal of Sureties, or in the other excepted Caſes, of Treaſon or Felony, and the HABEAS CORPUS.

IF Privilege will not hold throughout in the Caſe of a ſeditious Libel, it muſt be, becauſe that Offence is ſuch a Breach of the Peace, for which Sureties may be demanded; and if that be ſo, it will readily be admitted, that the Caſe comes within the Exception; provided always, that Sureties have been refuſed and that the Party is committed only, till he ſhall give Sureties.

BUT, *Firſt*, This Offence is not a Breach of the Peace, it does not fall within any Definition of a Breach of the Peace, given by any of the good Writers upon that Subject; all which Breaches, from Menace to actual wounding, either alone or with a Mul-

a Multitude, are deſcribed to be Acts of Violence againſt the Perſon, Goods or Poſſeſſions, putting the Subject in Fear by Blows, Threats or Geſtures; nor is this Caſe of the Libeller ever enumerated in any of theſe Writers among the Breaches of Peace; on the contrary, it is always deſcribed, as an Act tending to excite, provoke or produce Breaches of the Peace; and although a Secretary of State may be pleaſed to add the inflaming Epithets of treaſonable, traiterous or ſeditious, to a particular Paper, yet, no Words are ſtrong enough to alter the Nature of Things. To ſay then, that a Libel, poſſibly productive of ſuch a Conſequence, is the very Conſequence ſo produced, is, in other Words, to declare, that the Cauſe and the Effect are the ſame Thing.

Secondly, BUT if a Libel could poſſibly, by any Abuſe of Language, or has any where been called inadvertently, a Breach of the Peace, there is not the leaſt Colour to ſay, that the Libeller can be bound to give Sureties of the Peace for the following Reaſons:

BECAUSE none can be ſo bound, unleſs he be taken in the actual Committment of a Breach of the Peace; ſtriking, or putting ſome one or more of his Majeſty's Subjects in Fear.

BECAUSE there is no Authority, or even ambiguous Hint, in any Law Book, that he may be ſo bound.

BECAUSE no Libeller, in Fact, was ever ſo bound.

BECAUSE no Crown Lawyer, in the moſt deſpotic Times, ever inſiſted, he ſhould be ſo bound, even in Days, when the Preſs ſwarmed with the moſt envenomed and virulent Libels, and when the Proſecutions raged with ſuch uncommon Fury againſt this Species of Offenders; when the Law of Libels was ranſacked every Term, when Loſs of Ears, perpetual Impriſonment, Baniſhment and Fines of ten and twenty thouſand Pounds were the common Judgments in the Star-Chamber, and when the Crown had aſſumed an uncontroulable Authority over the Preſs.

Thirdly,

Thirdly, THIS Reſolution does not only infringe the Privilege of Parliament, but points to the Reſtraint of the perſonal Liberty of every common Subject in theſe Realms; ſeeing that it does, in Effect, affirm that all Men, without Exception, may be bound to the Peace for this Offence.

BY this Doctrine, every Man's Liberty, privileged as well as unprivileged, is ſurrendered into the Hands of a Secretary of State; he is, by this Means, impowered, in the firſt Inſtance, to pronounce the Paper to be a ſeditious Libel; a Matter of ſuch Difficulty, that ſome have pretended, it is too high to be intruſted to a ſpecial Jury of the firſt Rank and Condition: He is to underſtand and decide, by himſelf, the Meaning of every Inuendo; he is to determine the Tendency thereof, and brand it with his own Epithets; he is to adjudge the Party guilty, and make him Author or Publiſher, as he ſees good. And, laſtly, he is to give Sentence, by committing the Party. — All theſe Authorities are given to one ſingle Magiſtrate, unaſſiſted by Council, Evidence, or Jury, in a Caſe where the Law ſays, no Action will lie againſt him, becauſe he acts in the Capacity of a Judge.

FROM what has been obſerved, it appears to us, that the Exception of a ſeditious Libel from Privilege, is neither founded on Uſage or written Precedents, and therefore this Reſolution is of the firſt Impreſſion; nay, it is not only a new Law, narrowing the known and antient Rule, but it is likewiſe a Law, *ex poſt facto*, *pendente lite*, *et ex parte*, now firſt declared to meet with the Circumſtances of a particular Caſe: And it muſt be further conſidered, that this Houſe was thus called upon to give a Sanction to the Determinations of the other, who have not condeſcended to confer with us upon this Point, till they had pre-judged it themſelves.

THIS Method of relaxing the Rule of Privilege, Caſe by Caſe, is pregnant with this farther Inconvenience, that it renders the Rule precarious and uncertain: Who can foretel where the Houſe will ſtop, when they have, by one Infringement of their own

Standing

Standing Orders, made a Precedent, whereon future Infringements may, with equal Reaſon, be founded? How ſhall the Subject be able to proceed, with Safety, in this perilous Buſineſs? How can the Judges decide on theſe or the like Queſtions, if Privilege is no longer to be found in Records, and Journals, and Standing Orders? Upon any Occaſion Privilege may be enlarged, and no Court will venture, for the future, without Trembling, either to recognize or deny it.

We manifeſtly ſee this Effect of excluding, by a general Reſolution, one bailable Offence from Privilege To-day; that it will be a Precedent for doing ſo by another, upon ſome future Occaſion, till, inſtead of Privilege holding in every Caſe not excepted, it will, at laſt, come to hold in none, but ſuch as are expreſsly ſaved.

When the Caſe of the Habeas Corpus is relied upon, as a Precedent to enforce the preſent Declaration, the Argument only ſhews, that the Miſchief aforementioned has taken Place already, ſince one Alteration, though a very juſt one, and not at all applicable to the preſent Queſtion, is produced to juſtify another, that is unwarrantable.

But it is ſtrongly objected, that if Privilege be allowed in this Caſe, a Lord of Parliament might endanger the Conſtitution, by a continual Attack of ſucceſſive Libels; and, if ſuch a Perſon ſhould be ſuffered to eſcape, under the Shelter of Privilege, with perpetual Impunity, all Government would be overturned, and therefore it is inexpedient to allow the Privilege now, when the Time of Privilege, by Proragations, is continued for ever without an Interval.

This Objection ſhall be anſwered in two Ways: *Firſt*, If Inexpediency is to deſtroy perſonal Privilege in this Caſe of a ſeditious Libel, it is at leaſt as inexpedient, that other great Miſdemeanours ſhould ſtand under the like Protection of Privilege; neither is it expedient, that the ſmaller Offences ſhould be exempt from Proſecution in the Perſon of a Lord of Parliament; ſo, that if this Argument of Inexpediency is to prevail, it muſt prevail

vail throughout, and ſubvert the whole Law of Privilege in criminal Matters; in which Method of Reaſoning there is this Fault, that the Argument proves too much.

If this Inconvenience be indeed grievous, the Fault is not in the Law of Privilege, but in the Change of Times, and in the Management of Prorogations by the Servants of the Crown, which are ſo contrived as not to leave an Hour open for Juſtice. Let the Objection, nevertheleſs, be allowed in its utmoſt Extent, and then compare the Inexpediency of not immediately proſecuting on one Side, with the Inexpediency of ſtripping the Parliament of all Protection from Privilege on the other, unhappy as the Option is, the Public would rather wiſh to ſee the Proſecution for Crimes ſuſpended, than the Parliament totally unprivileged; although, notwithſtanding this pretended Inconvenience is ſo warmly magnified upon the preſent Occaſion, we are not apprized, that any ſuch Inconvenience has been felt, though the Privilege has been enjoyed Time immemorial.

But the ſecond and beſt Anſwer, becauſe it removes all Pretence of Grievance, is this, that this Houſe, upon Complaint made, hath the Power which it will exert in Favour of Juſtice, to deliver up the Offender to Proſecution.

It is a diſhonourable and an undeſerved Imputation upon the Lords, to ſuppoſe, even in Argument, that they would nouriſh an impious Criminal in their Boſoms, againſt the Call of offended Juſtice and the Demand of their Country.

It is true, however, and it is hoped, that this Houſe will always ſee, (as every Magiſtrate ought that does not betray his Truſt) that their Member is properly charged; but when that Ground is once laid, they would be aſhamed to protect the Offender one Moment; ſurely this Truſt (which has never yet been abuſed) is not too great to be repoſed in the high Court of Parliament; while it is lodged there, the public Juſtice is in ſafe Hands, and the Privilege untouched; whereas, on the contrary, if for the Sake of coming at the Criminal at once, without this

Ap-

Application to the Houſe, perſonal Privilege is taken away, not only the Offender, but the whole Parliament, at the ſame Time, is delivered up to the Crown.

It is not to be conceived, that our Anceſtors, when they framed the Law of Privilege, would have left the Caſe of a ſeditious Libel (as it is called) the only unprivileged Miſdemeanour; whatever elſe they had given up to the Crown, they would have guarded the Caſe of ſuppoſed Libels, above all others, with Privilege, as being moſt likely to be abuſed by outrageous and vindictive Proſecutions.

But this great Privilege had a much deeper Reach, it was wiſely planned, and hath hitherto, through all Times, been reſolutely maintained.

It was not made to ſcreen Criminals, but to preſerve the very Being and Life of Parliament; for, when our Anceſtors conſidered, that the Law had lodged the great Powers of Arreſt, Indictment, and Information, in the Crown, they ſaw the Parliament would be undone, if, during the Time of Privilege, the Royal Proceſs ſhould be admitted in any Miſdemeanour whatſoever, therefore they excepted none. Where the Abuſe of Power would be fatal, the Power ought never to be given, becauſe Redreſs comes too late.

A PARLIAMENT under perpetual Terror of Impriſonment, can neither be free, nor bold, nor honeſt; and if this Privilege was once removed, the moſt important Queſtion might be irrecoverably loſt, or carried by a ſudden Irruption of Meſſengers let looſe againſt the Members half an Hour before the Debate.

Lastly, as it has already been obſerved, the Caſe of ſuppoſed Libels, is, of all others, the moſt dangerous and alarming to be left open to Proſecution during the Time of Privilege.

If the Severity of the Law, touching Libels, as it hath ſometimes been laid down, be duly weighed, it muſt ſtrike both Houſes of Parliament with Terror and Diſmay.

This Repetition of a Libel, the Delivery of it unread to another, is ſaid to be a Publication; nay, the bare Poſſeſſion of it has been deemed criminal, unleſs it is immediately deſtroyed or carried to a Magiſtrate.

Every Lord of Parliament then, who hath done this, who is falſely accuſed; nay, who is, though without any Information, named in the Secretary of State's Warrant, has loſt his Privilege by this Reſolution, and lies at the Mercy of that Enemy to Learning and Liberty, the Meſſenger of the Preſs.

For theſe, and many other forcible Reaſons, we hold it highly unbecoming the Dignity, Gravity, and Wiſdom of the Houſe of Peers, as well as their Juſtice, thus judicially to explain away and diminiſh the Privilege of their Perſons, founded in the Wiſdom of Ages, declared with Preciſion in our Standing Orders, ſo repeatedly confirmed, and hitherto preſerved inviolable by the Spirit of our Anceſtors; called to it only by the other Houſe, on a particular Occaſion, and to ſerve a particular Purpoſe, *ex poſt facto, ex parte, et pendente lite,* in the Courts below.

Temple,
Bolton,
Grafton,
Cornwallis,
Portland,
Briſtol,
Devonſhire,
Scarborough,
Dacre,
Abergavenny,
Fred. Litch. Cov.
Aſhburnham,
Forteſcue,
Grantham,
Walpole,
Ponſonby,
Folkeſtone.